Cong. Rec. H1266 (daily ed. Feb. 27, 1996) (Statement of Rep. Brown).

NTTAA has led to an increase in governmental use of private sector standards, but Congressional support for the use of consensus standards is not unique to NTTAA. *See, e.g.*, 15 U.S.C. § 2056 (2000) (requiring the Consumer Product Safety Commission to rely upon voluntary consensus consumer product safety standards rather than promulgating its own standards); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 262, 110 Stat. 2021 (codified at 42 U.S.C. § 1320d) (requiring the Secretary of Health and Human Services to adopt standards developed by ANSI-accredited standards developers whenever possible); 29 U.S.C. § 655(a) (1972 Occupational Safety and Health Act provision requiring use of national consensus standards for initial occupational safety and health standards). ANSI and the system of voluntary consensus standards are integral to the work of regulatory agencies.

C. The ANSI standards adopted by the FCC were developed in an open, balanced, consensus-based manner, with an opportunity for appeal.

By requiring due process and the right to appeal at several levels of review, ANSI has established widespread confidence in, and credibility for, the standards it accredits. The standards at issue in this litigation[3] are prime examples of the fruits of this process. The committees and subcommittees that developed the C95 standards are recognized for their open, transparent, and consensus-based process throughout their extensive history.

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[3] The FCC's radiofrequency testing, certification, and emission standards at issue involve two of the C95 standards, C95.1, which identifies safe levels of human exposure to RF emissions, and C95.3, which establishes compliance testing requirements. *Amicus* will refer to these collectively as the "C95 standard" throughout this brief, unless otherwise noted.

The initial C95 standards were based on a collective research effort of the military, university researchers, and engineers. The origins of the C95.1 standard date back to the early 1940s when the U.S. Navy's Bureau of Ships directed the Naval Research Laboratory to research the biological effects of exposure to microwave radiation. B. Blake Levitt, *Electromagnetic Fields* 20 (Harcourt Grace & Co.) (1995). During the 1950s, the U.S. Air Force became involved, and both the Air Force and the Navy sponsored a significant amount of research into the biological effects of microwaves. In 1957, the Department of Defense asked the U.S. Navy's Bureau of Ships to conduct testing on the effects of personnel exposure to microwaves. *Id.* at 23-24.

Shortly thereafter, ANSI's predecessor, the American Standards Association ("ASA") approved the initiation of its Radiation Hazards standards project. *Id.* at 24. The Department of the Navy and the American Institute of Radio Engineers (now the Institute of Electrical and Electronics Engineers or "IEEE"), cosponsored the project, and established USASI Committee C95, which subsequently became ANSI Committee C95. *Id.* A University of Pennsylvania biophysicist chaired the committee that was charged with developing radiofrequency and microwave safety standards through an open, consensus-based process. *Id.* at 22.

The C95 Committee published its first recommendations for RF and microwave exposure in 1966, now referred to as ANSI C95.1-1966. *Id.* at 25. As the state of the art evolved, the committee published revisions in 1974 and in 1982. J.M. Osepchuk & R.C. Petersen, *Historical Review of RF Exposure Standards and the International Committee on Electromagnetic Safety (ICES)*, 6 Bioelectromagnetics Supplement S7, S8 (2003). IEEE and the U.S. Navy still cosponsored the committee at this time.

IEEE became an ANSI-accredited standards developing organization in 1982. In 1990, the ANSI C95 committee was

converted to Standards Coordinating Committee 28 ("SCC 28") under the sole sponsorship of the IEEE Standards Board. C95 standards were then issued and developed as IEEE standards under IEEE rules and policies, and submitted to ANSI for recognition and approval.

Consistent with both ANSI and IEEE commitments to an open and balanced consensus process, IEEE Subcommittee 4, tasked with revising the C95.1-1982 standard, was comprised of individuals from a cross-section of interests. These included members from the Food and Drug Administration, the Naval Aerospace Medical Research Laboratory, the Occupational Health and Safety Administration, the Environmental Protection Agency, the U.S. State Department, universities, industry, trade associations and public interest groups. By 1990, the Subcommittee had more than 120 members that participated in voting on the standard.

While the C95 subcommittee began the process of revising the 1982 standard in 1984, IEEE did not approve C95.1 until September 1991. The standard at that time was nearly nine years in the making, the fruit of countless hours of debate by individuals with expertise in radiofrequency radiation and electromagnetic fields. ANSI's BSR then reviewed C95.1 on an appeal by a consulting firm for the broadcasting industry, which alleged a lack of consensus among the broadcasting industry. The BSR ultimately denied the appeal, in part because the scope of the standard covered general public safety and was not limited to the broadcasting industry.

The system that developed the C95 standards is respected and recognized globally. The FCC evaluated and adopted, in large part, the C95 standards into its RF emission regulations. The FCC standards thus reflect not only the FCC's efforts, but also the benefit of many additional years of expert and public input into the development of the standards.

II. STANDARD-SETTING THROUGH PIECEMEAL LITIGATION NEGATES THE BENEFITS OF THE EXISTING FCC STANDARDS AND THE SYSTEM THAT DEVELOPED THEM.

A. Judicial decisionmakers lack the benefit of broad input and expertise available through agency-adopted consensus standards.

Respondents would have the Court deny the preemptive force of a federal standard that was developed in an open manner, respectful of due process, through the combined efforts of academic, industry, labor, government, trade association, and public interest representatives who achieved consensus on the technical merit of the standard after years of collaboration. In its place, Respondents urge the Court to allow multiple state court judges and juries to supplant the FCC RF emissions standard through a non-consensus-based decision-making process in which a narrow set of interested parties (generally, consumer and industry) present technical arguments to lay decisionmakers.

Respondents' position not only undermines the collaborative efforts of multiple federal agencies, *see FCC First Order, supra,* at 15124 ¶ 2, it ignores years of history during which a multitude of radiation health effects experts and affected interests reached consensus regarding the RF exposure levels established in the C95 standard. Because such a high degree of competence is required in each technical area encompassed within this standard, it is unlikely that allowing individual judges or juries to prescribe standards would achieve a superior result.

Respondents' concerns are best addressed though the existing ANSI process, in which public comments on the content of American National Standards are welcome and parties with materially affected interests can participate in their develop-

ment. *See* Joseph Farrell & Garth Saloner, *Coordination through Committees and Markets*, 19 Rand J. Econ. 235, 251 (1988) ("[C]ommittees are always desirable [for achieving coordination in the choice of technical standards.]").

B. Piecemeal standard-setting through litigation will frustrate Congress' intention of establishing a competitive wireless telecommunications service.

Regulation of RF emissions through piecemeal litigation in different states threatens the "availability of competitive wireless telecommunications services" H. R. Rep. No. 104-204, at 94 (I) (1995) achieved through the FCC's selection of a nationwide standard. Competition in both national and international markets necessitates selection of a single technical standard to ensure nationwide interoperability of portable wireless devices.

"For products, processes and services having an impact beyond the United States [such as wireless telecommunications technology, ANSI seeks] at most one globally applied standard and one globally accepted test with conformity assessment processes appropriate to the needs of the parties." ANSI, *Nat'l Standards Strategy for the United States*, 10-11 (2000) *at* http://www.ansi.org/standards_activities/nss/nss.aspx?menuid=3#1; *see also* Osepchuk & Petersen, *supra*, at S11 ("Because of the importance of uniform global standards in this area [i.e., RF emissions from wireless telecommunications technology] the subcommittee [IEEE product safety committee SCC34] was quickly populated with experts, many from outside the U.S. . . . .").

Without consensus on a single standard, U.S. consumers and business interests lose many benefits. *See* Nat'l Institute of Standards and Technology, Dep't of Commerce, *NTTAA: Frequently Asked Questions*, *at* http://ts.nist.gov/ts/htdocs/210/nttaa/nttaa-qa.htm ("Technical standards can enable or

constrain trade not only at the federal but also at the state and local levels."). When industry operates under a single technical standard, consumers receive multiple benefits, including interoperability and greater product competition. In the case of wireless communications technology, consumers are able to reliably use their telephone in any location in the country where wireless service is provided. Brief of Pet. at 17. With a single standard, industry incurs fewer transaction costs when entering a new market, enabling greater participation. Dep't of Commerce, *Standards and Competitiveness, Coordinating for Results* 12 (2004). This maximizes competition, thereby decreasing prices and potentially increasing the variety of choices available. *See* Gregory Tassey, Nat'l Institute of Standards and Technology, *Standardization in Technology-Based Markets* 2 (n.d.).

Standardization provides predictability for the producer as well, which in turn provides greater value for the consumer. A single standard allows industry to avoid the costs of developing needlessly duplicative technologies to comply with an unpredictable patchwork of standards. Dep't of Commerce, *Standards and Competitiveness, supra,* at 12. The reduction in consumer prices possible when producers are able to effectively assess and penetrate markets encourages more widespread and rapid adoption of the technology, which in turn increases producers' opportunities to take advantage of economies of scale. *See* Tassey, *supra,* at 2. The proliferation of state litigation reexamining federal standards threatens the continuation of these benefits and the availability of a competitive wireless telecommunications system in this country.

C. Use of tort litigation to set standards defeats the purpose of the public-private partnership Congress established under the NTTAA.

Standard-setting through tort litigation would frustrate Congress' requirement that federal agencies employ voluntary consensus standards when implementing federal policy, unless their use is inconsistent with applicable law or is impractical. NTTAA, Pub. L. No. 104-113, §12, 110 Stat. 775, 782-783 (codified as amended in 15 U.S.C. § 272 (1996)).

Through section 12(d) of NTTAA, Congress established as law the policies that were previously embodied in OMB Circular A-119. *See* 142 Cong. Rec. S1078-1082 (daily ed. Feb. 7, 1996) (Statement of Sen. Rockefeller). OMB adopted these policies after concluding that "standards developed by voluntary consensus standards bodies are often appropriate for use in achieving federal policy objectives and in conducting federal activities, including procurement and regulation." Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, 63 Fed. Reg. 8,545, 8,546 (Feb. 19, 1998). Among the benefits to government from the use of consensus standards are greater access to expertise in the private sector and the elimination of costs associated with developing government-unique standards. *Id.* The private sector benefits include the promotion of efficiency and competition, and hence economic growth, through harmonization of technical standards. *Id.*

Respondents would have this Court undermine this long-established partnership and its benefits. Allowing an endless procession of challenges to the FCC standard through state-law tort suits would create a disincentive for federal agencies to rely on voluntary consensus standards. Moreover, the increasing involvement of SDOs in tort litigation could deter

them from further participation.[4] Standard-setting through piecemeal litigation overrides Congress' express desire that these standards-developing entities play a *greater* role in establishing technical standards in areas where it is crucial to rely on their expertise and ability to achieve broad consensus.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the decision of the Fourth Circuit.

Respectfully submitted,

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October 3, 2005

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[4] *See* Osepchuk & Petersen , *supra*, at S11 (noting the dampening effect the Court's opinion in *ASME, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), had on participation in the voluntary consensus standards community). In fact, although ANSI is not a party to this litigation, it is currently a defendant in six product liability lawsuits pending in the D.C. Superior Court, and one product liability action pending in the United States District Court for the District of Maryland, which challenge the RF emissions standards at issue in this case.

No. 05-198

IN THE

Supreme Court of the United States

NOKIA, INC., *et al.*,

Petitioners,

v.

GARRETT NAQUIN, *et al.*

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE*, THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INCORPORATED, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE IEEE STANDARDS-DEVELOPMENT PROCESS IS BALANCED, PUBLICLY OPEN, AND AFFORDS DUE PROCESS TO ALL PARTICIPANTS AND OBSERVERS 5

II. THE STANDARDS AT ISSUE WERE DEVELOPED IN FULL COMPLIANCE WITH THE IEEE'S RIGOROUS PROCEDURES 8

A. The C95.1-1991 and C95.3-1991 Standards Are the Products of a Balanced, Lengthy, and Thorough Development Process 8

B. Even After Their Approval, the C95.1-1991 and C95.3-1991 Standards Continued to Undergo Review and Revision in Accordance with the IEEE's Formal Standards-Development Requirements 13

III. THE FOURTH CIRCUIT'S DECISION SERIOUSLY HARMS THE PUBLIC INTEREST BY PERMITTING MULTIPLE JURIES AND COURTS TO SUBSTITUTE THEIR JUDGMENTS ON HEALTH AND SAFETY MATTERS FOR CAREFULLY DEVELOPED, SCIENCE-BASED CONSENSUS STANDARDS 13

CONCLUSION 17

TABLE OF AUTHORITIES

FEDERAL CASES

Celco P'ship v. Pinney, 402 F.3d 430 (4th Cir. 2005).....2

FEDERAL STATUTES

National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12, 110 Stat. 775 (1996)...16

FEDERAL REGULATIONS

47 CFR § 2.1093 (2004) 4
47 CFR § 2.1093(d) (2004).....4

MISCELLANEOUS

IEEE Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields—RF and Microwave, IEEE Std C95.3-1991..... passim

IEEE-SA Standards Board Bylaws (2005), http://standards.ieee.org/guides/bylaws/ 6

IEEE Standards Board Form for Submittal of Proposed Standards, C95.1 submitted by Ronald C. Petersen (August 14, 1991) 11, 12

IEEE Standards Board Form for Submittal of Proposed Standards, C95.3 submitted by Ronald C. Petersen (May 14, 1991) 12

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IEEE Standards Companion (2003), http://standards.ieee.org/guides/companion/.....8

IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz, IEEE Std C95.1-1991 .... passim

J.M. Osepchuk & R.C. Petersen, *Historical Review of RF Exposure Standards and the International Committee on Electromagnetic Safety (ICES)*, 6 Bioelectromagnetics Supplement S7 (2003), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/106565259/PDFSTART.....9, 10, 13, 15

Letter from Ronald C. Petersen, Acting Secretary, SCC 28, to the Voting Membership, SCC 28 11

Office of Management and Budget Circular No. A-119 (revised), Feb. 10, 1998 16

R.C. Petersen, *Radiofrequency Safety Standard-Setting in the United States, in* Electricity and Magnetism in Biology and Medicine 761 (Ferdinando Bersani ed., 1999) 9, 10, 11

Standards Development at the IEEE Standards Association, http://standards.ieee.org/announcements /bkgnd_stdsprocess.html (Feb. 2005) 5, 6, 7

INTEREST OF AMICUS CURIAE[1]

The Institute of Electrical and Electronics Engineers, Incorporated ("IEEE") is a nonprofit, educational and scientific organization founded in 1963 with the merger of the American Institute of Electrical Engineers and the Institute of Radio Engineers, Incorporated. The IEEE has more than 365,000 individual members in over 150 countries. Its mission is to promote the engineering process of creating, developing, integrating, sharing, and applying knowledge concerning electronic and information technologies and sciences for the benefit of humanity and the profession.

The IEEE produces nearly thirty percent of the world's literature in the fields of electrical and electronics engineering and computer science. The IEEE, through its IEEE Standards Association ("IEEE-SA"), is also a leading developer of voluntary national and international safety and performance standards in a variety of fields. The IEEE-SA, an unincorporated organizational unit within the IEEE, develops a wide range of consensus-based standards through a balanced, publicly open, and fair process that involves the active participation of IEEE members and nonmembers with expertise in the subject area of the affected standard.

More specifically, the IEEE, through the IEEE-SA, sponsored the development of the Radio Frequency ("RF") safety standard (IEEE Std C95.1-1991) and the recommended practice for RF measurement (IEEE Std

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[1] No party or counsel to a party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* has made any financial contribution to its preparation or submission.

Counsel of record for all parties have consented to the filing of this brief. Their letters of consent are filed separately herewith.

C95.3-1991) on which the Federal Communications Commission ("FCC") based its exposure and testing regulations that are at issue in this case. Hence, the IEEE has intimate knowledge of the painstaking interdisciplinary process that led to the adoption of those standards and the scientific evidence on which they are based. The IEEE respectfully believes that this brief will aid the Court in understanding that process and the serious harm that the decision below will cause to both the work of standards-development organizations and the public interest.

The IEEE is not a party to the case below or the companion cases in *Celco Partnership v. Pinney*, 402 F.3d 430 (4th Cir. 2005), which are the subject of a separate petition for a writ of *certiorari* in No. 05-207. The IEEE is, however, a defendant in seven other tort suits in which the plaintiffs allege that they have suffered personal injury from their use of FCC-certified hand-held cellular telephones, which plaintiffs contend are dangerous products. These suits, all of which are now pending in state or federal courts, constitute direct attacks on the IEEE and its applicable standards. The IEEE thus also has a strong interest in defending its standards-development process and avoiding being drawn into similar suits that seek to collaterally attack science-based consensus standards and substitute for them the potentially divergent and inconsistent judgments of multiple lay juries and courts.

SUMMARY OF ARGUMENT

Respondents' suit alleges that portable hand-held cellular telephones are unsafe, even though they fully comply with FCC exposure and testing regulations. This suit thus constitutes a direct attack on those regulations and on the IEEE standards on which they are based. Those standards were developed over more than an eight-year period and build upon decades of prior science-based RF exposure standards. They represent the consensus view of over 125 experts in the fields of engineering, medicine and research, drawn from academia, government and industry. The standards-development process was, and is, open, public, and painstakingly thorough, and it affords all participants and observers multiple opportunities to appeal any perceived procedural defect or substantive error or oversight.

The public is best served by health and safety standards, like those at issue, that are based on verifiable and peer-reviewed scientific data rather than on unfounded speculation and fears. The standards-development process followed by the IEEE and its predecessors ensures, to the fullest extent possible, that all relevant reports and data are properly considered and that the standard is based on the best available scientific research and studies.

The decision below would undermine that process by allowing lay persons and courts in separate jurisdictions around the country to substitute their individual judgments for the consensus judgment of widely recognized experts who have devoted most of their careers to the subject matter of the standards. Such a result is inefficient, costly, and may lead to safety standards and requirements that do not adequately protect the public. It may also deprive the government and the public of the benefits of voluntary consensus standards development. For these reasons, the

IEEE respectfully submits this case is one of exceptional importance and worthy of the Court's review.

ARGUMENT

In 1996, the FCC promulgated regulations governing the RF-exposure levels of wireless devices, include hand-held cellular telephones. 47 CFR § 2.1093 (2004). Those regulations are based on two standards developed by working groups of an IEEE-sponsored committee and approved by the American National Standards Institute ("ANSI"): *IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz*, IEEE Std C95.1-1991 (sometimes referred to as the "*Exposure Standard*" or "C95.1-1991"); and *IEEE Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields—RF and Microwave*, IEEE Std C95.3-1991 (sometimes referred to as the "*Measurement Standard*" or "C95.3-1991").[2] *See* 47 CFR § 2.1093(d) (2004). Respondents' suit constitutes a direct challenge to those regulations and to the IEEE's standards-development process. The Fourth Circuit's decision permitting such challenges is contrary to the public interest and the protection of the public safety and health. Accordingly, this case poses exceptionally important issues that merit this Court's review.

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[2] C95.3-1991 is titled a recommended practice, but it was adopted pursuant to the procedures applicable to the adoption of a standard and accordingly, for convenience, will be referred to as such herein. In 1992, ANSI approved both standards as American National Standards, and ANSI refers to them as ANSI/IEEE C95.1-1992 and ANSI/IEEE C95.3-1992 respectively. *Amici* will refer to the standards simply as C95.1-1991 and C95.3-1991 unless the context requires otherwise.

I. THE IEEE STANDARDS-DEVELOPMENT PROCESS IS BALANCED, PUBLICLY OPEN, AND AFFORDS DUE PROCESS TO ALL PARTICIPANTS AND OBSERVERS

As an ANSI-accredited Standards-Development Organization ("SDO"), the IEEE adheres to strict, published procedures designed to ensure the integrity of the standards-development process and the adoption of standards based on the broadest possible consensus of experts in the affected fields. The hallmarks of this process are openness to all interested persons, visibility to the public, and responsiveness to, and fair consideration of, all competing viewpoints, research and data.

The process of developing an IEEE standard begins with sponsorship of the project by either an IEEE Society that encompasses the scientific field of the proposed standard or a Standards Coordinating Committee ("SCC"), which encompasses a spectrum of interests and expertise broader than those of any single IEEE Society.[3] *See generally Standards Development at the IEEE Standards Association*, http://standards.ieee.org/announcements/bkgnd_stdsprocess.html (Feb. 2005) (hereinafter "*Standards Development*").

The sponsor must obtain approval from the IEEE Standards Association Standards Board ("Standards Board") for all proposed standards projects. *IEEE-SA Standards Board Operations Manual* at 12, (2005) http://standards.ieee.org/guides/opman/index.html (hereinafter "*Operations Manual*").

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[3] IEEE Societies are unincorporated units of the IEEE whose members focus on a particular field or discipline of engineering or science.

If the Standards Board approves a project, the sponsor forms a working group or groups of experts and others who are interested in the subject matter of the standard. *Standards Development*. The working group members, however, need not be members of the IEEE. Moreover, none of the members of a sponsoring group or a working group is compensated for his or her time and effort.

The working group performs the day-to-day work necessary to develop and refine the proposed standard. Working groups and working group meetings are open to the public and generally have well-publicized procedures regarding membership, voting, officers, and recordkeeping. *Id*.

The sponsor also selects a balloting group to vote on the proposed standard once the working group completes its work. The balloting group must include a balance of individuals from affected interests such as government, industry, academia, and other interested persons to prevent any one interest group from dominating the balloting. *IEEE-SA Standards Board Bylaws* at 9, (2005) http://standards.ieee.org/guides/bylaws/ (hereinafter "*Standards Board Bylaws*"); *Operations Manual* at 19.

Members of the balloting group vote either to affirm or disapprove the proposed standard. If a balloting group member votes to disapprove a proposed standard, he or she must explain in writing the reasons for his or her disapproval. *Operations Manual* at 21.

The balloting group can only approve a standard if the balloting meets two criteria: a minimum of seventy-five percent of all ballots must be returned, and seventy-five percent of the returned ballots must approve the standard. *Id* at 22. Comments associated with negative votes,

however, must be addressed directly, in writing, by a ballot review or comment resolution committee ("BRG") even if a ballot has already received the necessary minimum number of responses and approvals. *Id.* The BRG must attempt to resolve the objections and redistribute the standard, along with the comments and comment resolutions, to the entire balloting group. Such redistribution ensures that all of the balloters are fully informed as to any potential disagreements with any aspect of the proposed standard and provides all balloters an opportunity, in light of those disagreements, to change their votes.

If and when the foregoing requirements are satisfied, the standard and its supporting materials are submitted to the Standards Board's Review Committee ("RevCom"). *Operations Manual* at 24. The RevCom examines the standard and associated documentation to ensure that the proper procedures were followed throughout the development of the standard. *Id.* If the RevCom is satisfied that the rigorous mandatory due process procedures were followed, it will recommend approval of the standard to the Standards Board. If, however, the RevCom finds the process potentially lacking in any way, it will send the proposed standard back to the sponsor to address those shortcomings.

If the RevCom recommends approval of a standard, it sends the proposed standard and its recommendation to the Standards Board, which votes either to ratify or deny it. *Standards Development.* If the Standards Board ratifies the recommendation of the RevCom, the draft standard is approved for publication as an IEEE standard. *Id.* Once so approved, the IEEE standard may be submitted to ANSI for approval, pursuant to ANSI procedures, as an American National Standard.